

BEFORE THE HONORABLE ANTHONY J. BATTAGLIA, JUDGE PRESIDING

IN RE INCRETIN-BASED THERAPIES,
PRODUCTS LIABILITY LITIGATION

AS TO ALL RELATED AND MEMBER CASES

) CASE NO. 13-MD-02452-AJB
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)
) SAN DIEGO, CALIFORNIA
) AUGUST 14, 2014
) 10:36 A.M.
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REPORTER'S TRANSCRIPT OF PROCEEDINGS
RE: CASE MANAGEMENT CONFERENCE

APPEARING TELEPHONICALLY: HONORABLE WILLIAM F. HIGHBERGER

OFFICIAL REPORTER: JEANNETTE N. HILL, C.S.R.
U.S. COURTHOUSE,
333 WEST BROADWAY, RM 420
SAN DIEGO, CALIFORNIA 92101
(619) 702-3905

REPORTED BY STENOTYPE, TRANSCRIPT PRODUCED BY COMPUTER

AUGUST 14, 2014

1 SPEAKING APPEARANCES:

2 FOR PLAINTIFFS:

3 HUNTER J. SHKOLNIK, ESQ.
4 NAPOLI BERN RIPKA SHKOLNIK & ASSOCIATES
5 111 CORPORATE DRIVE, SUITE 225
6 LADERA RANCH, CALIFORNIA 92694

7 MICHAEL K. JOHNSON, ESQ.
8 JOHNSON BECKER PLLC
9 33 SOUTH SIXTH STREET, SUITE 4530
10 MINNEAPOLIS, MINNESOTA 5402

11 TOR HOERMAN, ESQ.
12 TOR HOERMAN LAW, LLC
13 101 WEST VANDALIA STREET, SUITE 350
14 EDWARDSVILLE, ILLINOIS 62025

15 RYAN L. THOMPSON, ESQ.
16 WATTS GUERRA, LLP
17 5250 PRUE ROAD, SUITE 525
18 SAN ANTONIO, TEXAS 78240

19 FOR THE DEFENDANTS:

20 NINA GUSSACK, ESQ.
21 KENNETH KING, ESQ.
22 PEPPER HAMILTON, LLP
23 620 EIGHTH AVENUE
24 NEW YORK, NEW YORK 10018

25 ANA REYES, ESQ.
WILLIAMS & CONNOLLY
725 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20005

AMY J. LAURENDEAU, ESQ.
O'MELVENY & MEYERS LLP
610 NEWPORT CENTER DRIVE, 17TH FLOOR
NEWPORT BEACH, CALIFORNIA 92660-6429

CHRISTOPHER M. YOUNG, ESQ.
DLA PIPER LLP
401 B STREET, SUITE 1700
SAN DIEGO, CALIFORNIA 92101-4297

RAYMOND M. WILLIAMS, ESQ.
DLA PIPER
ONE LIBERTY PLACE
1650 MARKET STREET, SUITE 4900
PHILADELPHIA, PENNSYLVANIA 19103-7300

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1 SPEAKING APPEARANCES

2 TELEPHONICALLY: HEIDI LEVINE, ESQ.
3 DLA PIPER LLP
4 1251 AVENUE OF THE AMERICAS
5 NEW YORK, NEW YORK 10020

6 PAUL E. BOEHM, ESQ.
7 WILLIAMS & CONNOLLY
8 725 TWELFTH STREET, N.W.
9 WASHINGTON, D.C. 20005
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1 SAN DIEGO, CALIFORNIA THURSDAY, AUGUST 14, 2014; 10:36 A.M.

2 **DEPUTY CLERK:** CALLING MATTER ONE ON CALENDAR, CASE
3 NUMBER 13MD2452, IN RE INCRETIN MIMETICS PRODUCTS LITIGATION.

4 **THE COURT:** SO GOOD MORNING TO ALL OF YOU ON THE
5 PHONE, AND THOSE OF YOU IN THE COURTROOM. THIS IS JUDGE
6 BATTAGLIA. WE ARE CONVENING NOW ON THE PUBLIC RECORD
7 CONCERNING THE CASE MANAGEMENT STATUS CONFERENCE WITH REGARD TO
8 THE MDL AND THE RELATED CASES, THE THYROID CASES, AS WE
9 GENERICALLY DISCUSS THEM.

10 WE HAVE HAD, ONCE AGAIN, A PRODUCTIVE DISCUSSION IN
11 CHAMBERS WITH THE LEADERSHIP FOR THE PLAINTIFFS AND THE
12 DEFENDANTS, AND WITH THE KIND ASSISTANCE OF JUDGE HIGHBERGER,
13 WHO IS JOINING US ON THE PHONE FOR PURPOSES OF THE PUBLIC
14 SESSION.

15 JUDGE HIGHBERGER, YOU ARE BACK ON, SIR.

16 **JUDGE HIGHBERGER:** I AM INDEED.

17 **THE COURT:** OKAY. AND ALSO ON THE PHONE, MR. GOETZ
18 AND MS. LEVINE, WHO WERE PARTICIPANTS IN THE IN-CHAMBERS
19 CONFERENCE, YOU ARE BOTH THERE?

20 **MR. GOETZ:** YES, YOUR HONOR.

21 **MS. LEVINE:** YES, YOUR HONOR. THANK YOU.

22 **THE COURT:** AND BEFORE I GET TO THE APPEARANCES OF
23 THOSE IN THE COURTROOM, LET ME JUST TICK OFF THE PROPOSED
24 ATTENDANCE LIST AND CONFIRM WHO IS HERE. AND THIS IS IN NO
25 PARTICULAR ORDER, APPARENTLY.

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1 CATHERINE HEACOX, ARE YOU PRESENT? HEARING NOTHING.

2 MR. ROBERT MOSIER?

3 **MR. MOSIER:** HERE, YOUR HONOR.

4 **THE COURT:** MATTHEW TAYLOR?

5 **MR. TAYLOR:** HERE, YOUR HONOR.

6 **THE COURT:** NEAL ELLIOTT?

7 **MR. ELLIOTT:** HERE, YOUR HONOR.

8 **THE COURT:** SHAYNA SACKS?

9 **MS. SACKS:** HERE, YOUR HONOR. GOOD MORNING.

10 **THE COURT:** GOOD MORNING.

11 THOMAS HAKLAR?

12 **MR. HAKLAR:** GOOD MORNING, YOUR HONOR.

13 **THE COURT:** LA RAE HANCOCK?

14 **MS. HANCOCK:** HERE, YOUR HONOR.

15 **THE COURT:** JAMES FERRELL? NO.

16 TRIPP SEGARS?

17 **MR. SEGARS:** YES, YOUR HONOR.

18 **THE COURT:** IS IT SEGARS OR SEGARS?

19 **MR. SEGARS:** SEGARS.

20 **THE COURT:** OKAY. I HAD THREE CHOICES AND I GOT IT

21 WRONG.

22 LET'S SEE. MEKEL ALVAREZ?

23 **MS. ALVAREZ:** I'M HERE, YOUR HONOR.

24 **THE COURT:** W. JAMES SINGLETON? NOPE.

25 CHANTELL BOUTTE? NOPE.

1 DAVID DEARING?

2 **MR. DEARING:** HERE, YOUR HONOR.

3 **THE COURT:** PETER SNOWDON?

4 **MR. SNOWDON:** HERE, YOUR HONOR.

5 **THE COURT:** ROBERT JAMES? NOPE.

6 ANDY JOHNSON?

7 **MR. JOHNSON:** HERE, YOUR HONOR.

8 **THE COURT:** THANK YOU.

9 DAVID MCMASTER?

10 **MR. MCMASTER:** HERE, YOUR HONOR.

11 **THE COURT:** GREGORY VIDRINE?

12 **MR. VIDRINE:** HERE, YOUR HONOR.

13 **THE COURT:** JOSEPH WAECHTER?

14 **MR. WAECHTER:** HERE, YOUR HONOR.

15 **THE COURT:** CHAD MATTHEWS?

16 **MR. MATTHEWS:** HERE, YOUR HONOR.

17 **THE COURT:** PAUL STEVENS?

18 **MR. STEVENS:** HERE, YOUR HONOR.

19 **THE COURT:** MATTHEW SILL?

20 **MR. SILL:** BY PHONE, YOUR HONOR.

21 **THE COURT:** RAMON LOPEZ?

22 HOW ABOUT BRADY WILLIAMS?

23 **MR. WILLIAMS:** I'M HERE, YOUR HONOR.

24 **THE COURT:** RACHEL NEVAREZ?

25 **MS. NEVAREZ:** I'M HERE, YOUR HONOR.

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1 **THE COURT:** DAE YEOL LEE?

2 **MR. LEE:** HERE, YOUR HONOR.

3 **THE COURT:** JOHN RESTAINO?

4 NOPE.

5 TIMOTHY BROWN?

6 **MR. BROWN:** HERE, YOUR HONOR.

7 **THE COURT:** NEAL MOSKOW?

8 **MR. MOSKOW:** HERE, YOUR HONOR.

9 **THE COURT:** KEITH ALTMAN? NOPE.

10 MAX KENNERLY?

11 **MR. KENNERLY:** HERE, YOUR HONOR.

12 **THE COURT:** CHAFICA SINGHA?

13 **MS. SINGHA:** HERE, YOUR HONOR.

14 **THE COURT:** MARC BERN? NOPE.

15 LAURA SMITH?

16 **MS. SMITH:** HERE, YOUR HONOR.

17 **THE COURT:** STEVEN MURRAY?

18 **MR. MURRAY:** HERE, YOUR HONOR.

19 **THE COURT:** ANYBODY ELSE ON THE PHONE WHO I DID NOT
20 ACKNOWLEDGE?

21 **MS. ZAIC:** YES, YOUR HONOR. THIS IS JULIA ZAIC.

22 **THE COURT:** WOULD YOU SPELL THAT LAST NAME?

23 **MS. ZAIC:** Z-A-I-C.

24 **THE COURT:** THANK YOU. ANYBODY ELSE?

25 **MS. NASASH:** YES, YOUR HONOR. THIS IS MELISSA

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1 NASASH.

2 **THE COURT:** OKAY. THANK YOU. IS IT MESA, M-E-S-A?

3 **MS. NASASH:** NO, N, AS IN NANCY, A-S-A-S-H.

4 **THE COURT:** I REALLY MESSED THAT ONE UP. SORRY ABOUT
5 THAT.

6 WHO ELSE?

7 **MR. GOETZ:** YOUR HONOR, MICHAEL GOETZ, G-O-E-T-Z.

8 **THE COURT:** OKAY. ANYBODY ELSE? OKAY.

9 AND THEN LET'S TURN TO THE PLAINTIFFS' COUNSEL
10 PRESENT IN THE COURTROOM FOR THEIR APPEARANCES. WE'LL START
11 WITH YOU, MR. SHKOLNIK.

12 **MR. SHKOLNIK:** GOOD MORNING. HUNTER SHKOLNIK ON
13 BEHALF OF PLAINTIFFS.

14 **MR. THOMPSON:** YOUR HONOR, RYAN THOMPSON ON BEHALF OF
15 PLAINTIFFS.

16 **MR. HOERMAN:** TOR HOERMAN, ALSO ON BEHALF OF
17 PLAINTIFFS.

18 **MR. DEPEW:** BRIAN DEPEW ON BEHALF OF PLAINTIFFS.

19 **MR. PREUSS:** GOOD MORNING, YOUR HONOR. T.J. PREUSS
20 ON BEHALF OF PLAINTIFFS.

21 **MR. PEARSON:** KEN PEARSON FOR PLAINTIFFS, YOUR HONOR.

22 **MS. CROOKE:** YOUR HONOR, ELIZABETH CROOKE ON BEHALF
23 OF PLAINTIFFS.

24 **MR. CLARK:** GOOD MORNING, YOUR HONOR. TIMOTHY CLARK
25 ON BEHALF OF PLAINTIFFS, AND OUR LAW CLERK, DANIEL WHALEN, IS

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1 IN ATTENDANCE.

2 **MR. FINLEY:** CHAD FINLEY ON BEHALF OF PLAINTIFFS.

3 **MS. POLI:** STEPHANIE POLI ON BEHALF OF PLAINTIFFS.

4 **THE COURT:** ANYBODY ELSE?

5 **MR. JEW:** CHRISTOPHER JEW, LAW CLERK FOR ANDRE
6 SHERMAN, ON BEHALF OF PLAINTIFFS.

7 **THE COURT:** NEXT?

8 **MR. WAYMIRE:** JOHN WAYMIRE, ALSO FOR PLAINTIFFS.

9 **MS. EDWARDS:** LIBERTY EDWARDS, LAW CLERK WITH NAPOLI
10 BERN, ON BEHALF OF PLAINTIFFS.

11 **MR. STERNS:** CHASE STERNS (PH) ON BEHALF OF
12 PLAINTIFFS.

13 **MR. LEVENTHAL:** GOOD MORNING, YOUR HONOR. WILL
14 LEVENTHAL ON BEHALF OF PLAINTIFFS.

15 **THE COURT:** THANK YOU. LET'S GO TO THE JURY BOX.

16 **MR. JOHNSON:** YOUR HONOR, MICHAEL JOHNSON ON BEHALF
17 OF PLAINTIFFS.

18 **MR. DRAKULICH:** NICK DRAKULICH FOR THE PLAINTIFFS,
19 YOUR HONOR.

20 **MS. BLATT:** GAYLE BLATT, YOUR HONOR, FOR THE
21 PLAINTIFFS.

22 **THE COURT:** ALL RIGHT. VERY GOOD.

23 AND THEN ON THE DEFENSE SIDE, WHO WOULD LIKE TO
24 START? MS. GUSSACK.

25 **MS. GUSSACK:** NINA GUSSACK, YOUR HONOR, FOR DEFENDANT

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1 ELI LILLY.

2 **MR. KING:** KENNETH KING, FOR DEFENDANT ELI LILLY.

3 **MS. REYES:** ANA REYES FOR MERCK.

4 **MR. BOEHM:** PAUL BOEHM FOR MERCK, YOUR HONOR.

5 **MS. LAURENDEAU:** AMY LAURENDEAU FOR AMYLIN
6 PHARMACEUTICALS.

7 **MR. WILLIAMS:** RAY WILLIAMS FOR NOVO NORDISK, YOUR
8 HONOR.

9 **MR. YOUNG:** CHRISTOPHER YOUNG FOR NOVO NORDISK, YOUR
10 HONOR.

11 **THE COURT:** ALL RIGHT. THANK YOU. OKAY. I GUESS
12 THAT IS IT. WE'RE IN RECESS. (LAUGHTER) YOU WORE ME OUT.

13 **MR. YOUNG:** YOUR HONOR, THERE IS THE DEFENSE COUNSEL
14 ON THE PHONE, AS WELL.

15 **THE COURT:** BESIDES MR. GOETZ AND MS. LEVINE?

16 **MR. YOUNG:** OH, I'M SORRY. DID THEY INTRODUCE
17 THEMSELVES?

18 **THE COURT:** I ACKNOWLEDGED THEM. I GAVE THEM TOP
19 BILLING.

20 **MR. YOUNG:** I WILL PAY BETTER ATTENTION, YOUR HONOR.

21 **THE COURT:** THANK YOU FOR REMINDING ME.

22 OH, MS. TURNER.

23 **MS. TURNER:** VICKIE TURNER ON BEHALF OF MERCK.

24 **MS. MICHEK:** LAUREN MICHEK ON BEHALF OF NOVO NORDISK.

25 **THE COURT:** AND LAST BUT NOT LEAST.

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1 **MR. SWINTON:** STEVE SWINTON ON BEHALF OF ELI LILLY,
2 YOUR HONOR.

3 **THE COURT:** NOW, I CAN REST.

4 AS I SAID, WE HAD A PRODUCTIVE DISCUSSION WITH REGARD
5 TO THE STATUS OF THE GREAT DEAL OF WORK THAT IS ONGOING.

6 WE UTILIZED THE AMENDED JOINT SUBMISSION OF AGENDA
7 SUBMITTED AS DOCUMENT NUMBER 558, AS THE AGENDA FOR THE
8 DISCUSSION. AND I WILL REPORT TO YOU WHERE WE STAND ON MUCH OF
9 THIS, STARTING WITH ITEM NUMBER TWO.

10 ITEM NUMBER TWO WAS REGARDING THE REVISED PROTECTIVE
11 ORDER DEALING WITH THE SEALING OF DOCUMENTS, THAT WAS REQUESTED
12 OR SUGGESTED BY THE COURT. A JOINT DOCUMENT IS COMPLETE. I
13 ROUTED IT TO JUDGE DEMBIN FOR HIS REVIEW AND ENTRY, SO THAT
14 WILL BE ON FILE FAIRLY QUICKLY. SO THAT ITEM IS NOW ALL BUT
15 COMPLETE.

16 ITEM NUMBER THREE, THE PRIVILEGE PROTOCOL AND LOG
17 FORMAT WAS SUBMITTED JUST YESTERDAY. ALL COUNSEL ARE HAPPY
18 WITH IT. I HAD YET TO READ IT, BUT I PROMISED I WOULD DO THAT
19 AT THE CLOSE OF THIS HEARING. AND ABSENT SOME UNFORESEEN
20 PROBLEM, IT WILL BE SIGNED AND ENTERED TODAY. AND SO THAT IS
21 THE REPORT ON NUMBER THREE.

22 NUMBER FOUR WAS THE DECEDENT ESTATE ORDER, THE
23 MECHANISM TO HAVE AN INTERIM REPRESENTATIVE MOVE THE LITIGATION
24 FORWARD IN THE EVENT OF THE PASSING OF A PERSON WHO TOOK ONE OR
25 MORE OF THE PHARMACEUTICALS IN ISSUE HERE.

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1 I HAD PRESENTED TO SOME COUNSEL FOR EACH SIDE LAST
2 WEEK A PROPOSED ADDITION TO THE DOCUMENT TO GO AT PAGE SIX,
3 LINE 11, AS ITEM NUMBER FOUR, WHICH WILL READ AS FOLLOWS: NO
4 OTHER RIGHTS, COMMA, AUTHORITY OR ENTITLEMENTS ARE GRANTED TO
5 THE INTERIM ESTATE REPRESENTATIVES IN ANY OTHER STATE OR
6 FEDERAL COURT OR IN ANY PROCEEDING OR REGARDING ANY MATTERS OR
7 TRANSACTIONS THAT ARE NOT EXPRESSLY STATED IN THIS ORDER.

8 THIS WAS SUGGESTED BY THE COURT TO MAKE SURE THAT
9 THESE INTERIM REPRESENTATIVES HAVE NO MISIMPRESSION ABOUT THE
10 EXTENT OF THEIR POWERS. IT'S ONLY WHAT IT SAYS IN THE
11 DOCUMENTS, SO IT WOULD NOT UPSET THE POTENTIAL STATUTORY
12 REQUIREMENTS IN VARIOUS STATES WITH REGARD TO ESTATE
13 REPRESENTATIVE ACTION, DELAYS, AUTHORITY OR WHATEVER. THAT IS
14 UP TO THE RESPECTIVE COURTS OF THE APPROPRIATE JURISDICTIONS.
15 COUNSEL HAVE ALL AGREED -- THE MANAGEMENT COUNSEL -- AND THAT
16 WILL BE INJECTED INTO THE ORDER.

17 WE TALKED ABOUT A COUPLE OTHER MINOR THINGS SO THAT
18 THE COURT WAS CLEAR AND THE PARTIES WERE CLEAR AS TO THE
19 INTENT, AND THE DOCUMENT IS NOW IN ORDER TO BE SIGNED AND
20 ENTERED AND WILL BE HERE TODAY.

21 ITEM NUMBER FIVE, THE COMMON BENEFIT ORDER, HAS BEEN
22 SUBMITTED AND IS PENDING REVIEW. THE COURT ISSUED EARLIER A
23 TEN-DAY NOTICE FOR OBJECTIONS BY ANY INTERESTED PARTY,
24 PARTICULARLY ANY OF THE PLAINTIFFS' COUNSEL NOT PART OF THE
25 MANAGEMENT GROUP THAT WILL BE ASKED TO SIGN THE DOCUMENT TO

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1 TAKE THE BENEFITS AND ACCEPT THE RESPONSIBILITIES UNDER THAT,
2 TO AVOID HAVING TO LITIGATE OBJECTIONS POTENTIALLY MONTHS OR
3 YEARS FROM NOW AT A TIME WHEN THE COURT IS IN THE OF SETTING A
4 PERCENTAGE TO DEVOTE TO SUCH A COMMON BENEFIT FUND.

5 THIS COMMON BENEFIT ORDER WILL ENURE TO THE BENEFIT
6 OF THE JCCP LEAD COUNSEL. SO WE ARE EMBRACING THE COLLEAGUES
7 ACROSS THE -- DOWN HERE WE SAY ACROSS THE STREET BECAUSE THE
8 SUPERIOR COURT IS JUST ACROSS THE STREET. BUT IN THIS CASE
9 WE'RE DEALING WITH LOS ANGELES. BUT EITHER WAY, NO ONE'S OX
10 GETS GORED ON EITHER SIDE THAT IS PULLING THE HEAVIER OF THE
11 LOADS IN THESE CASES.

12 BUT IF ANYONE DOES HAVE OBJECTION, IT NEEDS TO BE IN
13 BY NEXT WEEK. AND IF THERE ARE OBJECTIONS, WE WILL ASK THE
14 PLAINTIFFS' STEERING COMMITTEE TO RESPOND AS THEY FEEL
15 APPROPRIATE BEFORE THE ORDER IS ENTERED AND THE DOCUMENT,
16 EXHIBIT A, IS APPROVED. THAT COMPLETES THE REPORT ON NUMBER
17 FIVE.

18 NUMBER SIX, COORDINATION OF WHAT WE'RE CALLING THE
19 THYROID CANCER CASES. DISCUSSIONS AMONG THE PARTIES RECOGNIZE
20 THE DEPTH OF DISCOVERY UNDERWAY RIGHT NOW IN THE PANCREATIC
21 CANCER CASES RELATIVE TO GENERAL CAUSATION AND PREEMPTION, AND
22 JOINTLY FEEL THAT IT WOULD BE PRUDENT TO TRAIL THE COMMENCEMENT
23 OF DISCOVERY, THE PROCESS OF DISCOVERY UNTIL WE GET PAST THIS
24 EARLY DISCOVERY ON THE PANCREATIC CANCER CASES. SO THERE WILL
25 BE NO OBLIGATIONS TO SUBMIT JOINT DISCOVERY PLANS OR ENGAGE IN

1 DISCOVERY UNTIL FURTHER ORDER OF THE COURT, SO THAT WE CAN TAKE
2 THE PANCREATIC ISSUES THAT ARE UNDERWAY AND GET THAT DISCOVERY
3 COMPLETED AND MOVE ON TO DISPOSITIVE MOTIONS, AND THEN THE
4 THYROID CAN FOLLOW SUIT.

5 IT'S A LATER-DEVELOPING SET OF CASES. THE SUBJECT
6 DISEASE IS OF A SLOWER GROWING NATURE, WITH A HIGH SURVIVAL
7 RATE. SO IN THE INTEREST OF ALL OF THE VARIOUS DYNAMICS HERE,
8 THE COURT FINDS IT PRUDENT AND PRACTICAL TO TRAIL THAT AND
9 CHECK ON IT PERIODICALLY.

10 WITH REGARD TO NUMBER ONE, THE STATUS OF DISCOVERY
11 THAT HAS FOUR SUBPARAGRAPHS WITH FURTHER SUBHEADINGS AND
12 VARIOUS OTHER INSERTED ITEMS, LET ME SAY THAT THERE ARE A
13 NUMBER OF WHAT I'M CALLING "SPEED BUMPS" THAT ARE CONFRONTING
14 THE PARTIES, THAT THEY NEED TO ADDRESS.

15 AND I HAVE ENCOURAGED THE CONTINUED MEET-AND-CONFER
16 PROCESS. EVERYONE IS TRYING. DISAGREEMENTS WILL ARISE, NO
17 DOUBT, EVEN UNDER THE BEST OF CIRCUMSTANCES. BUT I'M
18 SUGGESTING THAT WE CONTINUE WITH THE PICK-UP-THE-PHONE OR
19 MEET-IN-PERSON PROCESS TO HELP EXPEDITE SOME OF THESE SPEED
20 BUMPS; TO UTILIZE, DURING THESE MEET-AND-CONFERS, THE TECHNICAL
21 STAFF, EXPERTS OR WHATNOT WHEN IT COMES DOWN TO TRYING TO FIND
22 DATA OR INTERPRET DATA OR FACILITATE THE RECEIPT OF DATA, TO
23 MOVE THINGS ALONG. I MEAN, WE'RE FACING A JOINT APPROACH HERE,
24 A JOINT PLAN, IN A SENSE.

25 LOOKING AT THE ISSUES OF GENERAL CAUSATION, WHICH

1 I'VE DEFINED IN DOCUMENT, I THINK IT WAS 377, TO BE EVIDENCE
2 WITH REGARD TO THE SCIENCE BASES FOR THE DRUGS AND THE ISSUES
3 RELATED TO CAUSATION. AND THEN PREEMPTION, WHICH AT THE END OF
4 THE DAY BOILS DOWN TO THE INTENT OF THE FDA. AND AS PROBABLY
5 CAN SIMPLY BE DESCRIBED -- ALTHOUGH NOT SIMPLY DISCOVERED,
6 PROBABLY -- TO BE REALLY WHAT THE FDA HAD BEFORE IT. IN
7 ESSENCE, WHAT IT KNEW; WHAT IT DIDN'T KNOW.

8 I THINK THAT IS A LITTLE MORE CONFINED IN SCOPE THAN
9 THE GENERAL DISCOVERY, BUT I'D URGE US TO CONTINUE TO EXPEDITE
10 THE RESOLUTION OF THE BUMPS SO WE GET ON THE ROAD AND HIT THE
11 GROUND RUNNING.

12 I WILL JUST HIGHLIGHT THAT LILLY COMPLETED ITS
13 CERTIFICATION JUST YESTERDAY, AFTER THE SCOPE WAS EXPANDED
14 SOMEWHAT, AT THE PLAINTIFFS' REQUEST. IT'S NOW ASSERTED TO BE
15 COMPLETE. THE PLAINTIFFS HAVEN'T HAD A CHANCE TO REVIEW IT
16 ALL.

17 AMYLIN IS PROBABLY TWO WEEKS OUT FROM GETTING ALL OF
18 THE MATERIALS PRESENTED. AND THERE ARE SOME DISCUSSIONS WITH
19 REGARD TO THE FORMAT OF THE MATERIALS OR THE ABILITY TO
20 LOGISTICALLY WORK THROUGH THE MATERIALS, THAT COUNSEL WILL
21 CONTINUE TO DISCUSS.

22 ISSUES WITH REGARD TO THE EMA MATERIALS ARE STILL
23 BEING DISCUSSED, ALONG WITH SOMEONE HAS NOW RAISED THE ISSUE OF
24 HEALTH CANADA'S MATERIALS, STUDIES, COMMUNICATIONS AND WHATNOT.

25 DISCUSSION GOES ON WITH REGARD TO NON-CLINICAL

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1 TRIALS, HISTOLOGY SLIDES. AND THERE IS A POTENTIAL THAT SOME
2 OTHER CUSTODIANS MAY BE NECESSARY, THESE FOLKS HAVING BEEN
3 IDENTIFIED FROM DATA PRODUCED TO DATE.

4 I'M PLEASED TO REPORT THAT COUNSEL HAVE BEEN
5 EARNESTLY DISCUSSING THE IDENTITY OF THE NECESSARY CUSTODIANS,
6 SUPPLEMENTING SOME WHO MIGHT BE MORE APPROPRIATE AND LIMITING
7 OTHERS THAT SEEM TO NOT BE AS IMPORTANT. AND THAT PROCESS
8 WILL, HOPEFULLY, BE USED TO ADDRESS THE REQUEST FOR THE
9 ADDITIONAL CUSTODIANS.

10 DISCUSSIONS CONTINUE WITH REGARD TO ONGOING STUDY
11 RESULTS.

12 AND THEN THERE IS SOME WRITTEN DISCOVERY RELATED TO
13 OUTSIDE SOURCES AND SO FORTH, THAT THE PARTIES ARE GOING ON.

14 AND THEN, AS I MENTIONED, IN TERMS OF USING TECHNICAL
15 PEOPLE, ON SOME OF THE MEET-AND-CONFERS THERE ARE QUESTIONS
16 ABOUT WHETHER ALL THE STUDIES ARE INCLUDED OR NOT. BUT IN
17 LARGE PART IT MAY BE, AS IDENTIFIED IN ONE INSTANCE WITH MERCK,
18 ALL THE MATERIALS WERE PROVIDED, JUST CERTAIN CATEGORICAL
19 STUDIES BY NAME WERE NOT ON THE ACCOMPANYING LIST, BUT THEY
20 WERE THERE. SO COUNSEL NEEDS TO WORK THROUGH THOSE THINGS.

21 THE COURT DIDN'T RESOLVE ANY OF THE DISPUTES, HAS
22 FORMED NO OPINIONS AS TO THE MERIT OF ANYBODY'S POSITION, IS
23 NOT TAKING ANY POSITION WITH REGARD TO WHETHER ANYBODY'S
24 HOLDING UP THE TRAIN OR NOT, BUT JUST ENCOURAGING EVERYONE TO
25 CONTINUE TO WORK TO KEEP THINGS MOVING BECAUSE WE HAVE

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1 HUNDREDS, IF NOT SOMEDAY THOUSANDS OF PEOPLE WHO WILL BE
2 IMPACTED, BY THE CASE AND WE NEED TO GET TO THE SUBSTANCE OF
3 THESE ISSUES.

4 JUDGE HIGHBERGER, I WILL LET TAKE THE FLOOR NEXT
5 BECAUSE HE GAVE A JCCP STATUS UPDATE AND MADE SOME VERY
6 PROFOUND REMARKS ABOUT THE FACT THAT THIS IS NOT A PERFECT
7 WORLD THAT WE'RE DEALING IN, AND TO SOME DEGREE WE MAY GET THE
8 BEST POSSIBLE SET OF DATA BUT NOT A PERFECT SET; MAYBE
9 90 PERCENT OUGHT TO BE GOOD ENOUGH. AND I SHARE HIS SENTIMENT
10 THAT WE DON'T WANT TO GET BOGGED DOWN OVER A PARTICULAR ITEM
11 THAT MAY, AT THE END OF THE DAY, NOT MEASURE UP STATISTICALLY,
12 SIGNIFICANTLY OR OTHERWISE, IN WHAT WILL BE THE SALIENT ISSUES.

13 LASTLY, BEFORE I ASK JUDGE HIGHBERGER FOR HIS
14 COMMENTS, WE DISCUSSED THE POTENTIAL IMPACT OF MANY OF THESE
15 SPEED BUMPS WE WILL HAVE ON THE SCHEDULE THAT THE COURT IMPOSED
16 AT THE LAST CONFERENCE, THAT CALLS FOR EXPERT DISCLOSURES IN
17 NOVEMBER. AND DEPENDING ON HOW WE SORT THROUGH THESE BUMPS,
18 WE'LL REVISIT THE EFFICACY OF THE SCHEDULE AT A STATUS
19 CONFERENCE THAT WE'LL SET FOR SEPTEMBER 16TH AT 4:00 P.M.

20 COUNSEL WILL BE ENGAGED IN DEPOSITIONS AND WILL BE
21 ALL OVER THE PLACE, AND SO TELEPHONIC APPEARANCE IS CERTAINLY
22 APPRECIATED AND IS OPEN TO ALL SO THAT WE CAN JUST TAKE A READ
23 ON HOW WE'RE GOING.

24 THERE IS ONE MORE THING. ON THE ISSUE OF DISCOVERY
25 RESOLUTIONS THAT I HAVE UNDERTAKEN, I MADE COMMENTS ABOUT THE

1 FOUR INCHES OF MATERIAL THAT WERE RECENTLY SUBMITTED ON ONE OF
2 THE CURRENT DISPUTES, AND THE FACT THAT WE MAY NEED TO FIND
3 MORE SPECIFIC OR DISTINCT WAYS TO ADDRESS IT. I WAS ALERTED TO
4 THE FACT -- BY REPRESENTATIVES OF BOTH SIDES -- THAT MUCH OF
5 THE ATTACHMENTS, WHICH MAKE UP MUCH OF THE DOCUMENT, WERE THERE
6 TO JUST CONFIRM THAT CERTAIN EXCERPTS THAT ARE REFERENCED TO
7 ARE CORRECT, AND THEY ARE IN THE CONTEXT OF THE ENTIRE
8 DOCUMENT. AND SO NOT ALL OF THAT THREE-AND-HALF OF THE FOUR
9 INCHES OF MATERIAL IS NECESSARILY PERTINENT, BUT IT IS PUT INTO
10 THAT CONTEXT WITH THE IDEA THAT IT WOULD BE IN THE CONTEXT IN
11 WHICH IT WAS PRODUCED.

12 AND SO I MAY GO TO SOME DIFFERENT FORMAT. I'M GOING
13 TO THINK ABOUT IT AND CONSIDER WHETHER GOING BACK TO JOINT
14 STATEMENTS IS A GOOD IDEA. AND I WILL ISSUE AN ORDER WITH
15 FURTHER DIRECTION.

16 I WILL SAY, AT THE END OF THE DAY, MOST OF THESE
17 ISSUES ARE CONCEPTS, CATEGORICAL TYPES OF ISSUES. FOR
18 INSTANCE, HEALTH CANADA IS THE TOPIC. AND SO THE QUESTION IS
19 REALLY GOING TO BE WHAT YOU WANT, WHY YOU WANT IT. AND FROM
20 THE OTHER SIDE, WHY IT'S NOT NECESSARY, IN NON-LEGAL TERMS.
21 I'M STATING THIS. OBVIOUSLY, WE'LL APPLY THE LAW, BUT IT'S A
22 QUESTION OF WHAT, WHY AND WHY NOT, AND NOT A LOT MORE. WE CAN
23 DISPATCH MANY THINGS CATEGORICALLY AND EFFICIENTLY.

24 ANYWAY, ENOUGH SAID ON MY PART FOR THE MOMENT.

25 JUDGE HIGHBERGER, WHAT WOULD YOU LIKE TO ADD TO THE

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1 PUBLIC CONVERSATION, SIR?

2 **JUDGE HIGHBERGER:** WELL, I CONCUR WITH WHAT YOU SAID
3 ABOUT NOT HAVING FORMED ANY OPINIONS ON THE ISSUES THAT HAVE
4 BURBLED UP IN TERMS OF OPEN DISCOVERY DISPUTES, AND HOPE THAT
5 THE COOPERATION OF COUNSEL WILL LIMIT HOW MUCH HAS TO BE
6 RESOLVED. BUT, OBVIOUSLY, IF IT HAS TO BE REVOLVED, GET ON
7 WITH IT.

8 CONFIRMING THAT I WILL SEE COUNSEL IN THE COORDINATED
9 PROCEEDING A WEEK FROM TODAY AT THE PREVIOUSLY SCHEDULED NEXT
10 STATUS CONFERENCE.

11 YOU, JUDGE BATTAGLIA, HAVE FAIRLY WELL SUMMARIZED MY
12 COMMENTS ABOUT THE NATURE OF UNCERTAINTY IN LITIGATION. WE ARE
13 CERTAINLY GOING TO WORK TO TRY TO GATHER AS COMPLETE A DATABASE
14 AS IS REASONABLY POSSIBLE, COST-EFFECTIVELY, ON WHICH THE
15 COMPETING SIDES' EXPERT OPINIONS CAN BE DRAWN. BY THE SAME
16 TOKEN, IT IS PROBABLY CONCEPTUALLY IMPOSSIBLE TO RUN DOWN EVERY
17 LAST LOOSE END. SO WE HAVE TO ACCEPT THAT WE'RE GOING TO DEAL
18 WITH AN IMPERFECT DATA SET. AND ON THAT, THE COMPETING EXPERTS
19 WILL HAVE TO FORM THEIR OPINIONS AND HAVE THEM TESTED WITH
20 CROSS-EXAMINATION AND OTHERWISE.

21 AND I AM TRUSTING THAT THERE IS ENOUGH CLARITY TO
22 EACH SIDE'S POSITION THAT IF THEY DO HAVE PROBLEMS, AN EXPERT
23 IS ABLE TO SUPPORT THEIR DEFENSES OR THEIR CLAIMS, THAT THEY
24 ARE GOING TO BE ABLE TO MAKE IT OUT WHETHER OR NOT THE DATABASE
25 IS 90 OR 95 PERCENT CORRECT AND COMPLETE, AS COMPARED TO BEING

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1 99.6 PERCENT OR 100 PERCENT COMPLETE.

2 AND ALSO THE PASSING COMMENT ABOUT HIGH SCHOOL
3 CHEMISTRY, WHICH IS TO SAY WHEN YOU HAVE ONE FACTOR IN A
4 MULTIFACTOR EQUATION, IT DOESN'T REALLY MATTER IF YOU TAKE ONE
5 FACTOR OUT TO THE UMPTEENTH DECIMAL POINT JUST BECAUSE YOU HAVE
6 A SCALE THAT CAN MEASURE IT. IF THERE IS SOME OTHER FACTOR IN
7 THE ANALYSIS THAT IS INHERENTLY LESS PRECISE IT IS THE
8 IMPRECISE FACTOR THAT DETERMINES THE EXACTNESS OF THE OVERALL
9 CONCLUSIONS REACHED. AND I THINK THAT WE ARE ENGAGED IN A
10 PROCESS HERE THAT IS GOING TO HAVE SOME UNAVOIDABLE IMPRECISION
11 TO IT, ALBEIT WITH ENOUGH SCIENTIFIC RIGOR THAT IT MERITS
12 ADMISSION INTO EVIDENCE AS COMPETENT, PERSUASIVE EVIDENCE THAT
13 A FACT-FINDER SHOULD RELY ON.

14 SO THAT IS LONG-WINDED WAY OF SAYING WHEN WE TRY TO
15 GATHER AS MUCH INFORMATION AS WE CAN RECONSTRUCT, PARTICULARLY
16 GIVEN THAT WE WILL NEVER GET IT DIRECTLY FROM THE FOOD AND DRUG
17 ADMINISTRATION, THERE IS QUITE A BIT OF DIMINISHING RETURNS.
18 BUT I CERTAINLY AM NOT A FAN OF ANYBODY TRYING TO OBFUSCATE OR
19 PLAY HIDE THE BALL. SO LET'S DEAL WITH THAT IN A
20 COST-EFFECTIVE FASHION.

21 **THE COURT:** ALL RIGHT. WELL, THANK YOU, JUDGE.

22 AND LET ME OPEN IT UP, THEN, TO THE PLAINTIFFS' SIDE
23 TO EITHER CORRECT ME, IF I SAID SOMETHING WRONG, OR SUPPLEMENT
24 ANY OF THE COMMENTS WITH REGARD TO THE GENERAL STATUS ISSUES,
25 LEAVING FOR ANOTHER DAY THE SPECIFICS OF MANY OF THE BUMPS IN

1 THE ROAD THAT I HAVE IDENTIFIED.

2 ANYTHING ON THE PLAINTIFFS' SIDE THAT ANYONE WOULD
3 LIKE TO REPORT. MR. JOHNSON?

4 **MR. JOHNSON:** JUST ONE MOMENT, YOUR HONOR.

5 (PAUSE)

6 YOUR HONOR, MAY I MAKE ONE VERY QUICK COMMENT?

7 **THE COURT:** YES.

8 **MR. JOHNSON:** AGAIN, YOUR HONOR, MICHAEL JOHNSON. I
9 JUST WANTED TO ADDRESS THE ISSUE, JUST VERY BRIEFLY, IF I
10 COULD, OF THE NOTION OF POTENTIALLY GOING BACK TO JOINT
11 BRIEFING. AND RIGHT NOW THE CONCEPT IS WE WANT TO GET DONE AS
12 QUICKLY AS POSSIBLE AND MAKE YOUR SCHEDULE WORK.

13 AND AT FIRST BLUSH, JOINT BRIEFING SOUNDS LIKE A
14 QUICKER PROCESS. HAVING EXPERIENCED IT, WE HAD INCREDIBLE
15 DIFFICULTY WITH JOINT BRIEFING IN THE PAST. AND THE PROBLEM IS
16 THAT WE WOULD MEET AND CONFER. WE WOULD HAND OUR BRIEFS OVER
17 TO THE DEFENDANTS. AND THERE IS FOUR DEFENDANTS. AND THEY
18 HAVE A TEAM OF INCREDIBLY TALENTED LAWYERS. AND WE WOULD GET
19 IT BACK, AND THERE WOULD BE -- AS YOU WOULD IMAGINE WITH THAT
20 MANY TALENTED LAWYERS LOOKING AT IT -- THERE WOULD BE
21 ADDITIONAL ARGUMENTS IN THERE THAT NEVER CAME UP IN THE MEET
22 AND CONFER. AND THEN WE WOULD HAVE TO READJUST OUR POSITION,
23 AND THEN WE WOULD GIVE IT TO THEM. AND THAT WENT ON, SORT OF,
24 IN AN INFINITE PROCESS. AND GETTING THOSE MOTIONS OUT, QUITE
25 FRANKLY, FOR A COUPLE OF THEM WAS ALMOST IMPOSSIBLE, JUST

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1 BECAUSE THAT PROCESS HAS NO END. AND IT ALLOWS, TO SOME
2 EXTENT, THE DEFENDANTS TO CONTROL THE SCHEDULE. THESE ARE ALL,
3 AT THIS POINT, PLAINTIFFS' MOTIONS. JOINT BRIEFING, TO SOME
4 EXTENT, ALLOWS THE DEFENDANTS TO CONTROL THAT SCHEDULE.

5 WHEREAS HOW WE JUST DID IT, AND AGAIN WITH THE
6 COURT'S GUIDANCE WITH HOW YOU WOULD LIKE SUBMISSIONS, AND
7 KNOWING NOW THAT WE CAN PUT IN JUST THE RELEVANT PARTS OF THE
8 SUBMISSIONS, WE THINK THAT THAT WILL ACTUALLY BE MUCH QUICKER
9 THAN IT WAS IN THE JOINT PROCESSING -- THAN IN THE JOINT
10 BRIEFING PROCESS.

11 THERE ARE MOTIONS. WE ARE HAPPY AND CONFIDENT TO PUT
12 OUR POSITIONS ON PAPER AND RIDE WITH THEM WITHOUT NEEDING TO
13 CHANGE THEM MULTIPLE TIMES IN OUR RESPONSE TO THE DEFENSE
14 POSITIONS.

15 SO AGAIN, JUST FROM OUR POSITION, YOUR HONOR, WE
16 ACTUALLY THINK THAT THAT STYLE BRIEFING -- NOT ONLY THINK, BUT
17 THROUGH EXPERIENCE, KNOW THAT IT'S MUCH MORE EFFICIENT AND MUCH
18 QUICKER. THANK YOU.

19 **THE COURT:** I APPRECIATE THAT. AND AS I SAID, I'M
20 CONSIDERING IT. I RECOGNIZE THE BENEFITS AND THE BURDENS, AND
21 SO I APPRECIATE YOUR THOUGHTS.

22 AND IF THERE IS NOTHING ELSE FROM THE PLAINTIFFS'
23 SIDE, LET ME TURN TO THE DEFENSE. PERHAPS STARTING WITH
24 MR. GOETZ OR MS. LEVINE ON THE PHONE, ANYTHING YOU FOLKS WOULD
25 LIKE TO ADD ABOUT ANYTHING I HAVE SAID OR ANYTHING ELSE THAT

1 WE'VE DISCUSSED TODAY?

2 **MR. GOETZ:** NO, YOUR HONOR. THANK YOU.

3 **THE COURT:** AND MS. LEVINE?

4 **MS. LEVINE:** NO, YOUR HONOR. YOUR HONOR, ONLY WHAT
5 MY COLLEAGUE FROM MERCK, MR. BOEHM, SAID IN CHAMBERS ABOUT
6 TRYING TO SCHEDULE THE DEPOSITIONS AS SOON AS POSSIBLE BECAUSE
7 OUR WITNESSES ARE HOLDING DATES AND THEY ARE VERY BUSY AND WE'D
8 LIKE TO GET THOSE ON THE CALENDAR.

9 **THE COURT:** THANK YOU FOR REMINDING ME. YES, THE
10 DEFENDANTS HAVE PROPOSED DATES. THE PLAINTIFFS ARE RESPONDING
11 AS WE SPEAK AND WILL BE RESPONDING QUICKLY, RECOGNIZING THAT
12 MANY OF THESE FOLKS' SCHEDULES FILL UP FAST. AND SO THAT WAS A
13 DISCUSSION WE HAD IN CHAMBERS, THAT FOR THE BENEFIT OF ALL I'LL
14 REITERATE. AND I KNOW THE PLAINTIFFS ARE ANXIOUS TO GET THOSE
15 CONFIRMED, TOO.

16 LET ME TURN, THEN, TO THE DEFENSE COUNSEL IN THE
17 COURTROOM AND GIVE THEM THE OPPORTUNITY TO SAY ANYTHING THEY
18 WOULD LIKE ABOUT WHAT I REPORTED OR ANY OTHER LOOSE ENDS THAT I
19 MIGHT HAVE MISSED. MS. GUSSACK?

20 **MS. GUSSACK:** THANK YOU, YOUR HONOR. I WOULD ONLY
21 ADD THAT WE ARE EAGER TO RECEIVE THE COURT'S GUIDANCE ON HOW
22 BRIEFING SHOULD OCCUR. OUR EXPERIENCE IS NOT ACCURATELY
23 REPRESENTED BY WHAT WE HEARD FROM MR. JOHNSON, BUT WE CERTAINLY
24 SHARE THE GOAL OF HAVING AN EFFICIENT PROCESS FOR BRINGING
25 ISSUES TO THE COURT'S ATTENTION.

1 **THE COURT:** YES. IT'S A LITTLE BIT, ON THAT NOTE,
2 THINKING OUT LOUD, GOING INTO THE DISCOVERY CONFERENCE MODE
3 THAT I UTILIZED FOR 17 YEARS AS A MAGISTRATE JUDGE, OF TEEING
4 UP THE ISSUES SPECIFICALLY AND HAVING A QUICK CONFERENCE
5 DISCUSSION, HEARING, CALL IT WHAT YOU WILL. AND A RESOLUTION
6 MAY BE BEST RATHER THAN HAVING MATTERS FESTER FOR WEEKS WHILE
7 WE GO THROUGH MORE ELABORATE BRIEFING. I WILL GIVE YOU SOME
8 GUIDANCE SHORTLY, BUT I'M THINKING IN TERMS OF FINDING THE MOST
9 EXPEDITIOUS WAY TO DO IT QUICKLY, RECOGNIZING THAT THERE MAY BE
10 AN ISSUE OR TWO THAT WOULD WARRANT MUCH MORE FORMAL PROCESS --
11 AND I CAN'T GUESS WHAT THAT MIGHT BE. BUT TO GET THE DEFAULT
12 TO BE THE QUICK AND -- NOT SO PAINLESS, NECESSARILY -- BUT
13 QUICK AND EFFICIENT WAY TO DO IT. ANYTHING ELSE ON THE DEFENSE
14 CAMP?

15 **MS. REYES:** YOUR HONOR, ANA REYES. NOTHING MORE ON
16 BEHALF OF MERCK.

17 **THE COURT:** ANYBODY ELSE HAVE ANYTHING TO SAY?

18 **MS. LAURENDEAU:** NO, YOUR HONOR.

19 **THE COURT:** SO WE ARE CONFIRMED WITH THE SCHEDULE AS
20 PREVIOUSLY SET, RECOGNIZING THAT IT'S ALWAYS SUBJECT TO REVIEW
21 AS WE GO THROUGH THE PROCESS. WE'LL HAVE A TELEPHONIC CASE
22 MANAGEMENT CONFERENCE SEPTEMBER 16TH AT 4:00.

23 THE ORDERS I MENTIONED WILL BE ENTERED AS WITH ALL
24 ORDERS: THE PROTECTIVE ORDER, THE INTERIM DERIVATIVE PLAINTIFF
25 REPRESENTATIVE, THE PRIVILEGE LOG. ALL OF THAT. ALL OF THAT

1 IS ALWAYS SUBJECT TO MODIFICATION IF WE FIND THAT THE FIRST
2 MODEL WE'VE INVENTED HAS SOME FLAWS AND NEEDS TO BE RECALLED.

3 SO KEEP IN MIND THAT IT'S WHERE WE ARE FOR NOW, BUT
4 IF SOMEONE FINDS IT'S IMPRACTICAL OR UNWORKABLE OR THERE ARE
5 ISSUES WE HAVEN'T ANTICIPATED, WE CAN ALWAYS REVISE TO DO WHAT
6 IS RIGHT, HERE.

7 SO WITH THAT SAID, THANK YOU ALL VERY MUCH FOR YOUR
8 CONTINUED EFFORTS. I WILL LOOK FORWARD TO THE NEXT DISCUSSION,
9 AND YOU-ALL HAVE A GOOD DAY.

10 **MR. SHKOLNIK:** THANK YOU, YOUR HONOR.

11 **MS. GUSSACK:** THANK YOU, YOUR HONOR.

12 **THE COURT:** AND THANKS TO ALL OF YOU ON THE PHONE.

13 (PROCEEDINGS CONCLUDED AT 11:07 A.M.)

14 CERTIFICATION

15 I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
16 QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
17 STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT
18 TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE
19 ON AUGUST 14, 2014; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT
20 TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT
21 USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE
22 UNITED STATES JUDICIAL CONFERENCE.

23 DATED: AUGUST 20., 2014; AT SAN DIEGO, CALIFORNIA.

24 S/N
25 JEANNETTE N. HILL, OFFICIAL REPORTER, CSR NO. 11148

AUGUST 14, 2014